Supreme Court, U.S.
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No. 04-

IN THE

# Supreme Court of the United States

MICHAEL JOHNSON,

*Petitioner*,

*v.*

STATE OF INDIANA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF INDIANA

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This petition involves a murder prosecution in Indiana in which Petitioner Michael Johnson's primary defense counsel was a third-year public defender with no murder trial experience. Unprepared, the defender sought but was denied a continuance shortly before trial. At trial, only one witness identified Johnson as the shooter, and Johnson desired to testify that another suspect (a habitual offender) committed the crimes. Johnson's counsel, however, failed to prepare Johnson to exercise his constitutional right to testify, and hence did not call him to testify. Johnson was convicted and is serving a 60-year sentence.

Denial of post-conviction relief (ruling Johnson received effective assistance of counsel, and had not shown the outcome "would" have changed had he testified) was affirmed by the Indiana Court of Appeals. The Indiana Supreme Court, by a divided 3-2 vote, declined to review the matter. The Indiana courts decided an important question of federal constitutional law in a way that conflicts with relevant decisions of this Court, and also decided an important question of federal constitutional law that should be settled by this Court.

The two questions presented are:

**(1)** Whether, when a criminal defendant desires to testify, the Sixth Amendment's guarantee of effective assistance of counsel requires defense counsel to prepare the client to exercise the right to testify.

**(2)** Whether, in requiring Johnson to show the outcome "would" have changed had he testified, the state court decided an important question of federal law in a way that conflicts with the "reasonable probability" test established by this Court.

## RULE 14.1(b) STATEMENT

The following are parties to the proceeding in the State of Indiana:

1. Michael Johnson
2. State of Indiana
3. *Amicus curiae* Indiana Civil Liberties Union
4. *Amicus curiae* Dean Emeritus Norman Lefstein

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual, and Respondent is the State of Indiana.

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## OPINIONS BELOW

The 3-2 decision of the Indiana Supreme Court denying review is included in the Appendix ("App.") at 47a. The decision of the Indiana Court of Appeals affirming denial of post-conviction relief is included in the Appendix at 1a. The trial court decision denying post-conviction relief is included in the Appendix at 12a.

## JURISDICTION

The 3-2 decision of the Indiana Supreme Court denying review of the Indiana Court of Appeals decision was entered on October 28, 2004. This petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a public and speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense.*

U.S. Const. Amend. VI (emphasis added).

## STATEMENT OF THE CASE

### I. Background And Prior Treatment Of Constitutional Issues Presented

#### A. The Underlying Criminal Prosecution

A shooting occurred in Indianapolis in 1997, a period of time in which the city was experiencing a high number of murders. It is undisputed that one of two persons committed this particular shooting — either Demonn Carter ("Demonn" so as to avoid confusion among suspect Demonn Carter and victim Ron Carter) or Johnson — and that the other is innocent. This is a classic "whodunit" case that raises important questions of constitutional jurisprudence.

Johnson was prosecuted in Marion County, Indiana, for the murder of Gary Davenport ("Davenport") and the attempted murder of Ron Carter ("Ron"). The case stemmed from a drug transaction to which, it is undisputed, Johnson was not a party, and in which he did not know victims Davenport or Ron. Another individual, habitual offender Demonn, was present, was a party to the drug transaction, and knew the victims. Within days of the shooting, Demonn — an aspiring confidential informant — went to the police and blamed Johnson for the crime. Johnson was charged with murder, attempted murder, and possession of a handgun. No motive was ever established as to why Johnson would commit these crimes. Demonn was not prosecuted for these crimes.

Johnson, an indigent, was to be defended by the Marion County Public Defender's Office. Unfortunately, however, his case saw appearances from five different deputies, but

was ultimately assigned to and handled by a third-year lawyer (Ray Casanova ("Casanova")) who had never tried a murder case. This public defender sought and obtained several continuances in the case. Ten days prior to his first murder trial, the public defender moved for another continuance, accurately representing to the trial court that he was not prepared to defend his client. [App. 45a-46a]. Five business days prior to trial, the motion was denied (much to the public defender's surprise); Johnson was tried the next week; and he was convicted by a jury of murder, attempted murder, and possession of a handgun. [App. 45a]. Age 22 at the time of sentencing in October, 1998, Johnson was sentenced to 60 years for murder, 40 years for attempted murder, and 1 year for possession of a handgun, all to be served concurrently.[1]

Johnson appealed, challenging the trial court's admission of evidence that he had a prior criminal conviction. Because the public defender had waived this error by not preserving it with an objection at trial, the conviction was affirmed on review. [App. 36a].[2]

### B. The Post-Conviction Proceedings

Johnson, with the undersigned as new counsel serving *pro bono*, filed a petition for post-conviction relief challenging his murder and attempted murder convictions on the basis of ineffective assistance of counsel under the

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1. Johnson did not challenge the handgun possession charge, and it is not at issue in this Petition.

2. Indiana precedent precluded Johnson from raising ineffective assistance of counsel on direct appeal if he were to raise it later, with additional evidence, on post-conviction relief.

United States Constitution. At the PCR hearing, ineffective assistance of counsel was asserted on four different fronts based on undisputed facts, including that an inexperienced public defender trying his first murder case decided not to call Johnson to testify on his own behalf *solely* because he had failed to prepare Johnson to testify.

The trial court denied Johnson's PCR petition. [App. 12a]. With respect to the public defender's failure to prepare Johnson to exercise his constitutional right to testify, the trial court held that Johnson "was not prejudiced" by this. [App. 29a]. The trial court further held, applying the wrong constitutional standard, that Johnson's testimony "would not have affected the jury's verdict given the strength of the eyewitness testimony." [App. 29a].

### C. The Appellate Proceedings

Johnson timely initiated his appeal to the Indiana Court of Appeals, and requested oral argument. The Court of Appeals, however, never ruled on that request, so no oral argument was held. Johnson's appeal was supported by an *amicus curiae* brief of the Indiana Civil Liberties Union. The Court of Appeals, however, denied leave to the ICLU to participate.

By a nine-page memorandum decision, the Court of Appeals affirmed the trial court. With respect to the public defender's failure to prepare Johnson to exercise his constitutional right to testify, the court held that there was no prejudice from this. [App. 9a-11a]. The court did not reach the issue of whether the trial court applied the wrong legal standard when it held that Johnson's testimony would not

have changed the outcome. [App. 11a]. Johnson timely petitioned for rehearing, demonstrating that the appellate decision was erroneous. Johnson again asked for oral argument. The petition for rehearing and the request for oral argument were denied in one-line orders without explanation.

Johnson, again with the support of the Indiana Civil Liberties Union as *amicus curiae*, and also with the additional *amicus curiae* support of Norman Lefstein, Professor of Law and Dean Emeritus of the Indiana University School of Law – Indianapolis, sought transfer (discretionary review) to the Indiana Supreme Court to correct the illegal infringement of his constitutional rights.

### D. By A Divided 3-2 Decision, The Indiana Supreme Court Denied Review

On transfer to the Indiana Supreme Court, oral argument was held, and two Justices voted to grant transfer and review the matter. [App. 47a-48a]. A third vote for transfer was not obtained, however, so transfer was denied, the state court post-conviction proceedings terminated, and Johnson remains unlawfully incarcerated. The Indiana Supreme Court's one-paragraph order stated in relevant part, without citation of authority, that the post-conviction trial court ". . . did in fact apply the proper legal standard in deciding the case." [App. 47a].[3]

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3. With the assistance of the undersigned, Johnson has since initiated a separate habeas corpus proceeding under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Indiana, No. 1:04-CV-1810 (LJM-WTL). The State has asked for dismissal of the petition asserting untimeliness.

## II. Additional Undisputed Facts

### A. The Shooting

Demonn — a habitual violent offender now serving 80 years for an unrelated subsequent murder — came to Johnson's house on the morning of March 17, 1997, and asked him for a gun and to join him. After initial resistance, Johnson agreed. Demonn then drove them to the house of Davenport, a drug dealer whom Demonn knew. Johnson had never previously met Davenport. Ron — a convicted felon who had previously spent time in jail with Demonn — was also at the Davenport house. Johnson also did not know Ron, but Demonn did. Indeed, Demonn and Ron previously had served time in prison together.

An argument broke out — it is undisputed that the argument did *not* involve Johnson — and soon thereafter someone shot Davenport and Ron. The shooter was either Demonn or Johnson — no one else was present other than the two victims. Davenport died, while Ron went to Wishard Hospital and survived.

### B. Initial Descriptions Suggested That Demonn Was The Shooter

Ron's initial description of the suspect included the last name "Carter," and a physical description of height 5'9", about "200 pounds" and indicated the suspect had "two gold front teeth." It is undisputed that Demonn has gold teeth — Johnson does not. The "gold teeth" description was broadcast on local news. When first interviewed by police at Wishard,

Ron gave no indication by any description or otherwise that Johnson was the shooter.[4]

### C. Demonn Reports Johnson To The Police

While Johnson returned to his home, Demonn — who had been working to become a confidential informant with local police — remained busy. First, the day after the shooting, Demonn went to the detective with whom he was collaborating on drug set-ups, and Demonn accused Johnson of the shootings. Police failed to take available steps to investigate Demonn's culpability (such as doing gunshot residue testing on him).

Demonn then went to Wishard Hospital where the only surviving victim, Ron, was being treated. Demonn entered Ron's hospital room; a verbal altercation broke out; Ron yelled to his family to "get him [indicating Demonn] out that's one of the dudes that shot me"; and security was called. Ron's hospital room was changed for security reasons, and Ron remained concerned for his safety throughout the remainder of his Wishard stay. From that point on, Ron would consistently blame Johnson for the shootings and ultimately be the sole State's witness at trial pinning the shootings on Johnson.

Johnson paid no such visit to victim Ron. Instead, when police passed by Johnson's house the next day and indicated that they might be arresting him soon, he stated that he would be there. And indeed he was. When police arrested him, Johnson cooperated; gave a voluntary statement; admitted

4. Johnson is approximately 5'7" and 160 pounds, not 5'9" and 200 pounds.

being present at the scene of the crime; and admitted the elements of the handgun charge for which he was convicted and sentenced to one year, but Johnson denied the shootings.

### D. A Young, Inexperienced Public Defender Gets His First Murder Trial

In March of 1997, the State charged Johnson with the murder of Davenport and the attempted murder of Carter. A handgun possession charge was also included. Johnson was indigent, so the public defender's office was appointed to represent him. Johnson, of course, had the Sixth Amendment right to effective assistance of counsel in these very serious charges. Through the course of the next 17 months, however, five different public defenders would enter appearances for Johnson. Most provided no representation whatsoever. In December of 1997, third-year lawyer Casanova entered his appearance, and the case would be his and his alone to prepare for the trial that began on August 17, 1998. Casanova, though a devoted public servant, was now lead counsel in his first murder trial, yet he received no meaningful supervision and guidance from experienced supervising attorneys in preparing for trial.[5]

The public defender did perform some investigation, conducted some discovery, and filed some pre-trial motions prior to trial. Many tasks were never performed, however. For example, the public defender:

- failed to interview victim Ron's three family members who were at Wishard when Demonn had an altercation with Ron;

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5. The undersigned has great respect for those who serve the indigent as public defenders. Unfortunately, however, a combination of inexperience, lack of supervision, heavy case load, and unpreparedness led to ineffective assistance of counsel by the public defender's office.

- failed to interview Wishard hospital staff and security regarding Demonn's altercation with Ron;
- failed to procure and use Ron's medical records from Wishard, which are replete with evidence of Demonn's altercation with Ron and Ron's fear for his personal safety;
- failed to use the services of any experts;
- failed to depose Demonn, despite being told to do so in a written memo by a more senior public defender; and
- failed to bring Demonn before the jury so the jury could see Demonn's two front gold teeth (that matched the initial description given immediately after the shooting).

Despite the pendency of the case for 17 months, with only 10 days left before trial, on August 7, 1998, the public defender filed yet another motion for continuance because the public defender — by his own representation to the trial court — was not prepared for trial. [App. 45a-46a]. On the afternoon of August 10, 1998, the Court denied the continuance, so the unprepared public defender had four business days to prepare for his first murder trial. [App. 45a]. Disastrous results followed.

At trial, the public defender's actions and omissions included the following:

- he failed to seek exclusion of highly prejudicial evidence that Johnson was on parole at the time of the shooting;

- despite the public defender's desire to have Johnson testify at trial and Johnson's desire to testify, he failed to prepare him to testify; and

- because he had not adequately prepared Johnson to testify, he decided not to call Johnson to testify at trial.

Surviving victim Ron (with whom Demonn had an altercation at Wishard) testified at trial, declared that Johnson rather than Demonn was the shooter, and guilty verdicts were rendered on all counts against Johnson. His direct appeal to the Indiana Supreme Court on the murder and attempted murder charges, challenging the admission of the prejudicial evidence that he was on parole, was unsuccessful because the public defender had failed to object to such evidence, thus waiving the error. *Johnson v. State*, 725 N.E.2d 864, 867 (Ind. 2000).

### E. Unrefuted Evidence Of Objectively Deficient Representation Of Johnson

At the post-conviction trial, Johnson presented substantial and unrefuted evidence that the representation received in the murder trial was objectively deficient.

#### 1. *Unchallenged Evidence From The Inexperienced Public Defender*

Casanova, the public defender who tried his first murder case representing Johnson while in his third year of practice, testified at the post-conviction trial. His testimony was essentially unchallenged by the State.

Casanova would have benefited from more supervision and mentoring in the defense of Johnson's case. He had a heavy case load during the time he represented Johnson. Ten days before trial on August 7, 1998 — some 17 months after the case was filed against Johnson — Casanova filed a motion for continuance on a Friday due to his unpreparedness for trial. [App. 45a-46a]. The motion stated, "Due to defense counsel's trial calendar the last two months, he has not had an adequate opportunity to prepare for trial." [*Id.*]. That was a truthful statement to the trial court, and at the PCR hearing Casanova confirmed that there was "no question about that – that ten days before trial, [he was] not adequately prepared for the defense of the Michael Johnson murder case." That motion was filed on a Friday, and Casanova anticipated the motion would be granted.

On Monday afternoon, August 10, 1998, Casanova learned otherwise. Five business days prior to his first murder trial, a trial he was admittedly unprepared for, Casanova learned that the court had denied the continuance. That left only four work days before trial and much work left to be done. It was too late to do further investigation, witness interviews, or depositions. Notably, Casanova's client, Johnson, did not know that his lawyer was unprepared and that he had sought but not received a continuance.

When Casanova was assigned the case, he was instructed by a senior public defender to depose Demonn, the other possible shooter. Demonn was never deposed, however. Demonn, who had gold teeth consistent with the first suspect identification broadcast, was not brought before the jury at trial to show them his gold teeth.

Casanova admitted that "objectively speaking . . . attorneys defending Michael Johnson needed to show that Ron Carter was not credible in order to show reasonable doubt of Michael Johnson's guilt or innocence." He agreed that a public defender needed "to show a reason why Ron Carter would lie about Michael Johnson's role in the shooting."

Regarding evidence of Johnson's prior criminal conviction, Casanova admitted that defense counsel should attempt to keep 404(b) evidence of prior crimes from being heard by the jury. That is done, of course, by motions in limine or objections. He admitted it is objectively reasonable and prudent to try to keep out 404(b) evidence. However, he inexplicably allowed the admission of evidence before the jury that Johnson had a prior criminal conviction.

Regarding Johnson's constitutional right to testify in his own defense, Casanova believed that Johnson might make a good witness to testify in his own defense, but Casanova did not prepare Johnson to testify. Casanova testified:

Q. You thought he made a good impression?
A. Yes I did . . .

Q. And you desired to have him testify?
A. I did — yes.

Q. Because of the time constraints and your other obligations, it's accurate that you did not adequately prepare Mr. Johnson to testify in front of the jury — is that correct?
A. That's correct.

Q. And that impacted your decision to not have him testify in the case — is that correct?
A. Yes. That's correct.

Casanova further admitted in his post-conviction testimony that "we didn't have enough time to really sit down and prepare." Based upon the lack of preparation, Casanova "came to the conclusion that it would be better that he not — that he not testify." It was Casanova's experience that his client, an indigent 22-year old facing murder charges, deferred to his expertise and judgment.

### 2. *Johnson Denies The Murder Crimes*

Unprepared by his counsel to testify at his murder trial and thus not presented by counsel to deny the charges, Johnson did testify at his post-conviction trial.[6] Without challenge from the State, Johnson described to the post-conviction judge pro tempore that he had desired to testify in his murder trial. But his lawyer had recommended that he not testify, and Johnson deferred to his counsel's judgment.

At the post-conviction trial, Johnson denied shooting Ron and Davenport. When asked who did, he stated, "Demonn Carter." The jury in the murder case, however, never had the opportunity to observe Johnson deny the crimes under oath and accuse Demonn.

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6. Unfortunately the trial judge who had presided over the murder trial and who signed the post-conviction denial order, did not preside over the post-conviction trial (a pro tem judge did) so she did not see and hear him testify.

### 3. *Unchallenged Expert Opinion*

Johnson presented unrefuted expert testimony at the post-conviction trial from Bob Hill ("Hill"), an experienced criminal defense attorney. He was admitted in 1982, has been a public defender since 1985, and has tried over 200 jury trials. He has served as a deputy public defender, chief public defender, a public defender trainer, and is on the Board of Directors of the Indiana Public Defenders Council.

Hill outlined various objective standards and principles of criminal defense practice, all without impeachment. For instance, investigation and preparation are "extremely important" in a murder case. It is important in a murder case to study, deliberate, analyze, and select trial themes. It is then important to amass all possible evidence to support the themes selected.

Hill outlined the written objective guidelines established for criminal defense by the Indiana Public Defenders Council. These objective guidelines were developed based on standards from the American Bar Association, the National Legal Aid and Defender's Association, and case law. The objective standards embraced in the published guidelines applied as well in 1997-98 when Johnson's case was tried.

Among the many guidelines in the Public Defender Council's publication that were discussed by Hill is Guideline 7.5(b), which states that counsel should discuss with his client all of the considerations relevant to the client's decision to testify. Hill confirmed, without challenge, that it is objectively unreasonable for a defense lawyer not to have the defendant testify despite his desire to do so because of concerns that the defender had not adequately prepared him. The decision

whether to have the accused testify should only be made after a thorough investigation and preparation.

Hill, knowledgeable about the Marion County Public Defender's office, confirmed that the office's case load was too high at the time of Johnson's murder trial. Finally, regarding defense counsel's failure to keep 404(b) other crimes evidence from the jury, Hill confirmed — again without objection or impeachment — that this failure was objectively unreasonable. Such 404(b) evidence can be excluded by a motion in limine, and Hill confirmed that limine motions and redactions of 404(b) evidence are routine. Excluding such evidence is important because a jury might think the defendant is a "bad guy."

Unchallenged and unrefuted on any of these points, Hill concluded as follows:

> Q. In your judgment in this case, from what you know about it, did the ... Public Defender's Office, did its defense fall below reasonable standards of defense in the following: in failing to investigate [Wishard] witnesses and records?
> A. Yes.
>
> Q. In failing to depose Demonn Carter?
> A. Yes.
>
> Q. In failing to consider bringing Demonn to trial ...
> A. To display him to the jury ...

Q. Yes.
A. Yes.

* * *

Q. In failing to prepare Michael Johnson to testify so as to be able to make an informed decision about whether to have him testify?
A. Yes.

Q. In failing to object to evidence of Michael Johnson being on parole?
A. Yes.

Q. [B]ut for these failures, either alone or in combination — is it your professional opinion that there's a reasonable probability that the result would have been different in Michael Johnson's case?
A. Yes.

Hill concluded that the public defender did not render effective defense to Johnson. Hill's final, unchallenged opinion was as follows, "The Public Defender's Office did not do justice to your client. And sadly so."

### 4. *Unrefuted Evidence Establishing A Reasonable Probability That Effective Assistance Of Counsel Would Have Made A Difference*

Substantial and unrefuted evidence was presented at the post-conviction trial establishing a reasonable probability that effective assistance of counsel would have made a difference, and much of that evidence is previously outlined above. In addition, without objection or impeachment, Hill confirmed that "it is reasonably probable that [Johnson] would have made a good impression on the jury, [and had he] testif[ied], would have impacted the outcome of the case." Casanova thought Johnson would make a good witness, and had desired to have him testify (but then failed to prepare him).

Finally, Hill testified — again without objection or impeachment — that defense counsel's errors and omissions, alone and in combination, were prejudicial, and that but for those failures, a reasonable probability exists that the result would have been different:

> Q. [B]ut for these failures, either alone or in combination — is it your professional opinion that there's a reasonable probability that the result would have been different in Michael Johnson's case?
>
> A. Yes.

## REASONS FOR GRANTING THE PETITION

### I. Summary Of Grounds

The Indiana proceedings resulted in a decision that is contrary to this Court's relevant holdings, and that decides an important question of federal law that should be settled by this Court. First, to sustain his Sixth Amendment claim of ineffective assistance of counsel, Indiana required Johnson to show that had he testified, the result *would have been different*. This is contrary to this Court's well-settled *reasonable probability* standard. Second, the Indiana proceedings essentially decided that it is constitutionally permissible for defense counsel not to prepare defendants to testify. Several other states and one U.S. Circuit Court of Appeals have indicated otherwise. This Court should specifically address this Sixth Amendment issue to settle this important question.

As a result of these constitutional errors, Johnson was denied effective assistance of counsel as guaranteed by *Strickland v. Washington*, 466 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003), on the standards of the "effective assistance" required by the Sixth Amendment. He was also denied his right to testify. *Rock v. Arkansas*, 483 U.S. 44, 46 (1987) (in confirming the constitutional right to testify to be a fundamental right, the Court writes, "In fact, the most important witness for the defense in many criminal cases *is the defendant himself*") (emphasis added); *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system").

## II. Indiana Imposed A Higher Sixth Amendment Standard Upon Petitioner To Show That Effective Assistance Of Counsel "Would Have Changed" The Result, Conflicting With Relevant Decisions Of This Court

The Indiana courts erred as a matter of law by not properly applying this Court's legal standards to the undisputed evidence. For instance, the trial court wrote in its legal conclusions, "None of the evidence produced during his post-conviction investigation constitutes evidence that *would have changed* the result of Petitioner's trial." [App. 28a] (emphasis added). On the core issue of Johnson's right to testify at trial, the trial court similarly held, ". . . such testimony *would not have affected* the jury's verdict. . . ." [App. 30a] (emphasis added).

This is the incorrect legal standard, however, for Johnson's burden to protect his Sixth Amendment rights was only to show a *reasonable probability* that the outcome would have been different, *not* that the evidence "*would have changed*" the result. *Strickland v. Washington*, 466 U.S. at 694 ("defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). The former, accurate legal standard merely requires that Johnson undermine confidence in the outcome. *Id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome"); *Wiggins v. Smith*, 539 U.S. at 534 (same). The latter standard applied by the Indiana courts would improperly require a guarantee of a different result, contrary to this Court's well-settled Sixth Amendment precedent.

This constitutional error was not corrected on appeal to the Indiana Court of Appeals nor by the divided Indiana Supreme Court. The Court of Appeals simply declined to reach the issue, while a slim majority of the Indiana Supreme Court actually declared — without citation of authority — that the post-conviction trial court applied "the proper legal standard in deciding the case." [App. 47a]. This Court should grant the writ of certiorari to correct this constitutional error.

## III. Indiana Erroneously Decided An Important Question Of Federal Law That This Court Should Settle: The Sixth Amendment's Guarantee Of Effective Assistance Of Counsel Requires Defense Counsel To Prepare Clients To Exercise Their Constitutional Right To Testify

The Indiana courts essentially ruled there is no prejudice to a defendant's Sixth Amendment rights when counsel fails to prepare the accused to testify and the accused does not testify as a result. At least one state suggests otherwise. In *Magbual v. State*, 20 P.3d 676, 2000 Haw. App. LEXIS 147, *26 (Haw. Ct. App. 2000), the court wrote that "if defense counsel fails to perform sufficient preparation and investigation to be able to adequately advise a defendant whether or not to testify, e.g., by failing to ascertain the full scope of a defendant's possible testimony, this could constitute a 'lack of diligence' amounting to ineffective assistance of counsel." *See also State v. Graham*, 906 S.W.2d 771, 786 (Mo. Ct. App. 1995) ("The defendant made the decision [to testify], but the defendant was entitled to reasonably competent advice in making the decision"), *vacated, in part, on other grounds* at 969 S.W.2d 759 (Mo. Ct. App. 1998).

Moreover, at least three other jurisdictions recognize that defendants have the right to be prepared to testify on their own behalf. In *Perrero v. State*, 990 S.W.2d 896, 899 (Tex. Ct. App. 1999), for instance, defense counsel was held to be ineffective for failing to adequately prepare the defendant before he testified. The court explained:

> Mr. Perrero described the entire process of deciding whether or not he would testify as being a split second decision. "After the state presented all their witnesses Mr. Hill [trial counsel] turned to me and asked me if I would care to get on the stand. And I told him I didn't know, and he said, 'Well, do you feel like doing it?' And I said, "I guess so'."

*Id.* at 899. In granting relief and ordering a new trial, the Texas Court of Appeals concluded, "In this case, trial counsel's failure to properly prepare Mr. Perrero for his testimony was both ineffective and extremely prejudicial, to the extent that it undermines our confidence in the outcome of the proceeding." *Id. See also People v. Smith*, 237 A.D. 2d 388, 655 N.Y.S.2d 416 (N.Y. S. Ct. 1997) (failure to prepare defendant to testify contributed to ineffective assistance of counsel).

Similarly, in *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), the court wrote:

> Smyth's failure to adequately consult with and prepare his client to testify did not meet the standard of competent representation. . . . Counsel's admission that he spent at most forty-five minutes with Turner prior to trial demonstrates deficient

> performance. . . . Smyth's cursory consultation is especially shocking in light of the seriousness of the charges against Turner, the fact that the entire defense hinged on Turner's intent and mental state, and that Turner testified in a manner that suggests he was wholly unprepared to answer questions on cross-examination.

*Id.* at 457.

Although it is "well established that the defendant has the right to testify on his own behalf . . . ," *Riggins v. Nevada*, 504 U.S. at 144 (Kennedy, J., concurring), this Court has not addressed the present situation when defense counsel fails to prepare the accused to testify, resulting in the accused not exercising his constitutional right.

A criminal defendant does, in fact, have a constitutional right to testify on his own behalf. *In re Oliver*, 333 U.S. 257, 273 (1948); *Rock v. Arkansas*, 483 U.S. at 49-53; *Riggins*, 504 U.S. at 144. This right is "an aspect of [the criminal defendant's] right to defend himself," *Underwood v. Clark*, 939 F.2d 473, 475 (7th Cir. 1991), which arises from the Sixth Amendment's guarantee of compulsory process to obtain favorable witnesses, *see Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 808 (1994) as well as the Fifth Amendment's due process clause. It is also a "necessary corollary" of the Fifth Amendment's guarantee against compelled testimonial self-incrimination. *United States v. Manjarrez*, 258 F.3d 618, 623-24 (7th Cir. 2001). Only the defendant may waive this right, not counsel, and it must be knowing and voluntary. *Id.*

Moreover, this Court recently explained that an attorney has an obligation to consult with an accused regarding his right to testify. In *Florida v. Nixon*, 2004 U.S. LEXIS 8270, 125 S. Ct. 551, 560, (Dec. 13, 2004), the Court wrote:

> An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy. *Strickland*, 466 U.S. at 688. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.' *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

125 S. Ct. at 560 (parallel citations omitted).

Despite this precedent, Indiana has effectively excused defense counsel from the obligation to prepare the accused to testify. Without such preparation, however, no meaningful consent can be given by the accused to counsel's recommended course of action. In cases such as this — when

the evidence is hotly contested and the defendant desires to testify — failure to prepare the accused to testify simply cannot be deemed effective assistance of counsel. This Court should grant the writ of certiorari so that this important constitutional issue can be settled.

## CONCLUSION

Indigent defendants must depend on public defenders to protect their constitutional rights. When public defenders fail to do so, the courts are the constitutional safety net. The Indiana courts, however, failed to follow this Court's precedent on the appropriate constitutional standard, and effectively determined that defense counsel need not prepare clients to testify. The petition for a writ of certiorari should be granted accordingly so that this Court can address and settle these important constitutional issues.

Respectfully submitted,

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## APPENDIX A —MEMORANDUM DECISION OF THE COURT OF APPEALS OF INDIANA DATED JANUARY 16, 2004

**IN THE**
**COURT OF APPEALS OF INDIANA**

No. 49A02-0302-PC-168

MICHAEL JOHNSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

APPEAL FROM THE MARION SUPERIOR COURT The Honorable Heather Welch, Judge Pro Tempore
Cause No. 49601-9703-PC-42739

**January 16, 2004**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Michael Johnson ("Johnson") was convicted of murder and attempted murder in Marion Superior Court. After his

convictions were affirmed on direct appeal, he filed a petition for post-conviction relief alleging that he was denied effective assistance of trial counsel. The trial court denied his petition. Johnson appeals arguing that his trial counsel was ineffective for conducting an inadequate pretrial investigation, for failing to object to the admission of evidence that Johnson was on parole, and for advising Johnson not to testify at trial. Concluding that Johnson's trial counsel was not ineffective, we affirm.

**Facts and Procedural History**

Facts pertinent to this appeal are found in our supreme court's resolution of Johnson's direct appeal.

> On March 17, 1997, Johnson and Damone Carter ("Damone") went to the home of Gary Davenport. There is conflicting testimony about the nature of the visit, although it was either to purchase drugs from Davenport or to rob him. Ronald Carter ("Ronald"), a friend of Davenport, was also at the house; he was watching television and trying "to program a radio."
>
> When Johnson and Damone arrived at the house, Davenport came outside and spoke with Damone. Then, Ronald called out to Davenport that he had a phone call, so the three entered the house. At first, Damone, Ronald, and Johnson sat in the living room while Davenport went into a back room to hang up the phone. Damone and

*Appendix A*

Ronald had previously met in prison and began getting reacquainted. After Davenport hung up the phone, he went into the kitchen area, which was visible from the living room. Johnson and Damone walked in between the living room and the kitchen, speaking with Davenport and with each other.

Eventually, Ronald looked up from fixing the radio and noticed that both Johnson and Damone were in the doorway facing him. Johnson pulled a gun out of the waistband of his pants. Ronald tried to run toward a patio door to his left, but a shot hit him in the back of the leg. Ronald fell, but managed to pull himself up and attempted to throw a television at Johnson, who was still standing in the doorway. By now, however, Johnson had turned and was shooting at Davenport, who was still in the kitchen. When Ronald threw the television, Johnson turned and again shot at Ronald hitting him in the arm. This shot caused Ronald to fall through the patio door.

When the police arrived, Ronald was still lying on the patio. Davenport was found dead, with gunshot wounds, in a utility room off of the kitchen. Ronald was taken to the hospital and required surgery.

The day after the shootings, Damone met with several police detectives and revealed that Johnson had shot Ronald and Davenport. At trial,

> Ronald identified Johnson as the man who shot him and Davenport.
>
> The trial court sentenced Johnson to concurrent sentences of sixty years for murder, forty years for attempted murder, and one year for carrying a handgun without a license.

*Johnson v. State*, 725 N.E.2d 864, 866-67 (Ind. 2000).[1]

On November 21, 2001, Johnson filed a petition for post-conviction relief alleging that Johnson's constitutional rights "to effective assistance of counsel were infringed by the inadequate representation of the unprepared public defender, who failed to adequately investigate and prepare the case for trial." Appellant's App. p. 202. A hearing was held on Johnson's petition on January 14, 2003, and his petition was denied on February 14, 2003. Johnson now appeals. Additional facts will be provided as necessary.

**Standard of Review**

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Saylor v.*

1. In his direct appeal, Johnson raised two issues 1) whether the admission of evidence concerning Johnson's prior criminal history constituted fundamental error, and 2) whether his sentence was manifestly unreasonable. *Id.* at 866. The supreme court determined that Johnson waived his claim concerning the admission of evidence of his prior criminal history and that admission of that evidence did not constitute fundamental error. *Id.* at 867 n.2. The court also held that his sentence was not manifestly unreasonable. *Id.* at 869.

*State*, 765 N.E.2d 535, 547 (Ind. 2002). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Saylor*, 765 N.E.2d at 547. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "'A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.'" *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000).

**Discussion and Decision**

Johnson argues that his trial counsel was ineffective for 1) conducting an inadequate pretrial investigation; 2) failing to object to the admission of evidence that he was on parole; and 3) advising him not to testify at trial.[2] Ineffective assistance of counsel claims are governed by a two-part test. First, the defendant must show that counsel was deficient,

2. We reject Johnson's underlying argument that his counsel was ineffective due to his inexperience. *See Saylor*, 765 N.E.2d at 549 (Ind. 2002) (Counsel's inexperience "does not necessarily amount to ineffective assistance of counsel."). Although this was Johnson's counsel's first murder trial, we note that counsel was ably assisted at trial by a more experienced public defender.

i.e., "show[ ] that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Wrinkles v. State*, 749 N.E.2d 1179, 1188 (Ind. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Second, the defendant must prove that counsel's deficient performance prejudiced the defendant, i.e., show that the defendant was deprived of a fair trial with a reliable result, and show that there is a reasonable probability that with effective assistance, the result of the proceeding would have been different. *Id.* at 118889 (citing *Strickland*, 466 U.S. at 687). "Failure to satisfy either prong will cause the claim to fail. Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citations omitted).

The post-conviction court is guided by various important guidelines in determining whether a defendant proves his claim of ineffective assistance of counsel. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002). "There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* (citations omitted).

*Appendix A*

First, Johnson argues that his counsel was ineffective for conducting an inadequate pretrial investigation. Specifically, Johnson contends that his counsel failed to 1) interview the victim's three family members who were in Ronald Carter's hospital room "when Demonn[3] had an altercation with Ron[ald] Carter;" 2) failed to interview Wishard hospital staff and security regarding that altercation; and, 3) failed to procure Ronald Carter's Wishard medical records which contain statements regarding the altercation. Br. of Appellant at 8.

With regard to the events that took place at Wishard Hospital, Ronald Carter testified that on the day after the shooting, Demonn came to his hospital room. Trial Tr. p. 296. Ronald stated that when he saw Demonn he told his family members to "get him out that's one of the dudes that shot me." *Id.* His family members then removed Demonn from the room. Ronald also testified that he was frightened by Demonn's visit because Demonn was "with the dude ... that shot" him, and he felt Demonn "might be here to do somethin' to me since I'm the only one that was left[.]" *Id.* Johnson's counsel's argument at trial was that Demonn was the shooter, and Ronald lied when he testified that Johnson was the shooter because he was afraid of Demonn. Further, Johnson's counsel argued that Demonn visited Ronald's hospital room in an attempt to intimidate him. Supp. Trial Tr. p. 120.

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3. Although in the trial transcript, his name is spelled "Damone," upon further review of the record, it appears that "Demonn" is the proper spelling of Demonn Carter's name.

*Appendix A*

At the PCR hearing, Johnson's PCR counsel admitted deposition testimony from Ronald Carter's mother, who was present in the hospital room during the altercation with Demonn, and Ronald's medical records. However, the testimony and records do not reveal any additional information concerning the events that occurred at Wishard and are merely cumulative of Ronald's testimony at trial. Therefore, Johnson has failed to establish that he was prejudiced by his trial counsel's failure to interview potential witnesses or obtain Ronald's medical records. *See Hyppolite v. State*, 774 N.E.2d 584, 603 (Ind. Ct. App. 2002), *trans. denied.*

Johnson also argues that his trial counsel 1) failed to promptly inspect the crime scene; 2) failed to inspect certain forensic evidence "that could have exonerated Johnson;" 3) failed to identify and interview possible witnesses in the neighborhood where the shooting occurred; 4) failed to use the services of any experts; 5) failed to interview all of the State's witnesses; 6) failed to depose Demonn Carter, and, 7) failed to bring Demonn before the jury so the jury could observe his two front gold teeth.[4] Br. of Appellant at 8. However, Johnson fails to make any specific argument demonstrating how counsel's failure to conduct such investigation prejudiced his defense,[5] and he therefore cannot prevail on his claim of ineffective assistance of counsel.

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4. Ronald Carter initially gave a description to the police that one of the shooters had two front gold teeth. Although the jury never observed Demonn's gold teeth, there was evidence admitted at trial concerning the fact that Demonn had two gold teeth.

5. In arguing that he was prejudiced by counsel's failure to conduct such an investigation, Johnson relies on his trial counsel's (Cont'd)

Next, Johnson argues that his defense was prejudiced when his trial counsel failed to object to evidence that Johnson was on parole at the time the offenses were committed. In his direct appeal, Johnson argued that admission of such evidence constituted fundamental error. *Johnson*, 725 N.E.2d at 867 n.2. Our supreme court rejected this claim stating that admission of such evidence did not render the trial unfair to the Johnson. *Id.* Given our supreme court's decision that admission of this evidence did not constitute fundamental error, we cannot conclude that there is a reasonable probability that the outcome of Johnson's trial would have been different had this evidence not been admitted at trial. *See Manuel v. State*, 793 N.E.2d 1215, 1220 (Ind. Ct. App. 2003), *trans. denied.*

Finally, Johnson argues that "post-conviction relief is required because Johnson was denied his right to testify through the sub-par representation of the public defender." Br. of Appellant at 25. At the post-conviction hearing, Johnson's trial counsel testified that Johnson likely would have been a good witness and would have made a good impression on the jury, but that he advised Johnson not to testify because he did not have time to adequately prepare Johnson. PCR Tr. pp. 64-65. Further, he stated that Johnson deferred to his expertise and judgment in deciding not to

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(Cont'd)
and expert's general opinion that had counsel conducted a more detailed investigation there is a reasonable probability that the outcome of the trial would have been different. However in reaching those conclusions, Johnson's trial counsel and expert witness failed to provide a specific reason explaining why the alleged inadequate investigation prejudiced Johnson's defense.

testify. *Id.* However, counsel also stated that he would have called Johnson to testify had Johnson insisted on doing so. *Id.* at 66.

Initially, we observe that "the determination of whether or not a defendant should testify is matter of trial strategy." *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998) (citing *Anderson v. State*, 565 N.E.2d 336, 338 (Ind. 1991)). *See also Moore v. State*, 655 N.E.2d 1251, 1254 (Ind. Ct. App. 1995) ("[C]ounsel's decision to not have the defendant testify is a trial tactic that should not be second guessed on appeal."). "[U]ltimately the client, not his attorney, must choose either to testify and risk the dangers inherent in being cross-examined, or remain silent and thereby keep possibly damaging information from the jury." *Anderson*, 565 N.E.2d at 338.

Johnson contends that he was prejudiced by his counsel's advice not to testify because the jury "never had the opportunity to observe Mr. Johnson deny the crimes and accuse Demonn." Br. of Appellant at 14. However, Johnson's statement to the police was admitted into evidence at trial and in that statement Johnson stated that Demonn was the shooter. *See* Trial Tr. pp. 492, 596; State's Ex. 54; Defendant's Ex. K.[6] Consequently, Johnson's accusation that Demonn was the shooter was presented to the jury. Johnson therefore has failed to demonstrate that there is a reasonable probability that the outcome of his trial would have been different if he had disregarded his counsel's advice and testified at his trial.

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6. At trial, the State introduced the audiotape of Johnson's statement to the police into evidence, and the defense introduced a transcript of Johnson's statement into evidence.

*Appendix A*

## Conclusion

Johnson's claim that his counsel was ineffective for failing to conduct an adequate pretrial investigation, failing to object to the admission of evidence that he was on parole, and advising Johnson not to testify must fail because Johnson failed to demonstrate that his trial counsel's performance prejudiced his defense. Therefore, the trial court properly denied Johnson's petition for post-conviction relief.[7]

Affirmed.

NAJAM, J., and ROBB, J. concur.

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7. Johnson also argues that the trial court applied an incorrect legal standard in denying his petition. In its findings of fact and conclusions of law, the trial court stated that "[n]one of the evidence produced during his post-conviction investigation constitutes evidence that would have changed the result of Petitioner's trial." Appellant's App. p. 246. Johnson contends that "[t]his is the incorrect legal standard, however, for Mr. Johnson's burden was only to show a *reasonable probability* that the outcome would have been different, *not* that the evidence '*would have changed*' the result." Reply Br. of Appellant at 2 (emphasis in original). Because we conclude that Johnson has failed to establish prejudice, i.e. a reasonable probability that the result would have been different, we need not address this issue.

## APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING POST-CONVICTION RELIEF OF MARION SUPERIOR COURT, CRIMINAL DIVISION FILED FEBRUARY 14, 2003

STATE OF INDIANA

COUNTY OF MARION

**IN THE MARION SUPERIOR COURT**
**CRIMINAL DIVISION, ROOM ONE**

NO. 49G01-9703-PC-042739

MICHAEL JOHNSON

v.

STATE OF INDIANA

**FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING POST-CONVICTION RELIEF**

Under the Indiana Post-Conviction Rule 1(6), the Court now enters its specific findings of fact and conclusions of law on all issues raised in this Cause.

**FINDINGS OF FACT**

1. The evidence supporting the murder conviction of Petitioner is recounted by our Supreme Court as follows:

> On March 17, 1997, Johnson and Damone Carter ("Damone") went to the home of Gary Davenport.

*Appendix B*

There is conflicting testimony about the nature of the visit, although it was either to purchase drugs from Davenport or to rob him. (See R. at 339-40, 600-01.) Ronald Carter ("Ronald"), a friend of Davenport, was also at the house; he was watching television and trying "to program a radio." (R. at 261.)

When Johnson and Damone arrived at the house, Davenport came outside and spoke with Damone. Then, Ronald called out to Davenport that he had a phone call, so the three entered the house. At first, Damone, Ronald, and Johnson sat in the living room while Davenport went into a back room to hang up the phone. Damone and Ronald had previously met in prison and began getting reacquainted. After Davenport hung up the phone, he went into the kitchen area, which was visible from the living room. Johnson and Damone walked in between the living room and the kitchen, speaking with Davenport and with each other.

Eventually, Ronald looked up from fixing the radio and noticed that both Johnson and Damone were in the doorway facing him. Johnson pulled a gun out of the waistband of his pants. Ronald tried to run toward a patio door to his left, but a shot hit him in the back of the leg. Ronald fell, but managed to pull himself up and attempted to throw a television at Johnson, who was still standing in the doorway. By now, however,

> Johnson had turned and was shooting at Davenport, who was still in the kitchen. When Ronald threw the television, Johnson turned and again shot at Ronald, hitting him in the arm. This shot caused Ronald to fall through the patio door.
>
> When the police arrived, Ronald was still lying on the patio. Davenport was found dead, with gunshot wounds, in a utility room off of the kitchen. Ronald was taken to the hospital and required surgery.
>
> The day after the shootings, Damone met with several police detectives and revealed that Johnson had shot Ronald and Davenport. At trial, Ronald identified as the man who shot him and Davenport.

*Johnson v. State*, 25 N.E.2d 864, 866-67 (Ind. 2000).

2. On March 21, 1997, the State charged Petitioner with murder, attempted murder, and carrying a handgun without a license. Petitioner's Exhibit 24, pp. 32-33.

3. Petitioner was originally represented by appointed counsel Lori Howard until she left the Marion County Public Defender Agency in November 1997. Petitioner's Exhibit 18. When Howard left the agency, Raymond Casanova was appointed to represent Petitioner, and Howard turned her file over to Casanova. *Id.*

4. Counsel Casanova was admitted to practice law in the State of Indiana in 1994 and was employed by the Public Defender Agency from the time of his admission. Although Petitioner's trial was Casanova's first murder trial, he had represented criminal defendants in between 20 and 25 jury trials before Petitioner's trial. Casanova requested assistance from Robert Hill, who was also employed by the Public Defender agency, due to Casanova's lack of experience, but Hill could not assist Casanova. Consequently, Mark Earnest entered an Appearance in the case to help Casanova with the trial. Earnest was an experienced trial attorney who had conducted between 15 and 20 murder trials by the time of Petitioner's trial. Petitioner's Exhibit 23.

5. Before trial, counsel visited the crime scene and reviewed the witness statements. Counsel also filed pretrial motions and consulted with Petitioner. Counsel did not take codefendant Carter's deposition because he was a co-defendant. Counsel did, however, file pre-trial motions, including a Motion to Sever, which the Court denied. Petitioner's Exhibit 24, pp. 91, 98-99, 103-06, 107, 108, 114-15, 116. Counsel also indicated that he would present the testimony of Jarel Wilhite who "has given a statement to the police in which he presented exculpatory evidence for the Defendant." *Id.* at 100.

6. A week before the trial, counsel Casanova requested a continuance, which he expected to be granted. The Court, however, denied the motion. *Id.* at 96-97.

7. Immediately before trial, the State moved to sever co-defendant Carter because the State had "made an offer to

Mr. Damone Carter." *Id.* at 210. Petitioner objected to the severance, but co-defendant Carter joined in the severance motion. *Id.* at 211-12, 214. Petitioner's counsel argued that the severance would deny Petitioner the right to confront and cross-examine co-defendant Carter. *Id.* at 211-12. The Court granted the motion for severance. *Id.* at 214.

8. Petitioner by counsel then moved to exclude any evidence that co-defendant Carter apologized to victim Carter when he visited him at the hospital and to exclude evidence that the photo array was generated by the Indianapolis Police Department. *Id.* at 216-17. The Court granted both motions. *Id.*

9. The theory of defense was that there was a reasonable doubt as to whether Petitioner committed the crime. Counsel argued in opening, as follows:

> Ladies and Gentlemen, Michael Johnson is innocent of these charges, and he's been waiting a year and a half to be vindicated on them. The evidence in this case will show that it was Damon [sic][1] Carter and not Michael Johnson who orchestrated the crimes in this case. That it was Damon Carter that knew Ron Carter and Gary Davenport. That it was Damone Carter who arranged the drug deal with Gary Davenport, that

1. Co-defendant Carter's first name is spelled various ways in the transcript, the Court's file, and the appellate court's opinion. When Petitioner's post-conviction counsel deposed co-defendant Carter, Mr. Carter stated that the correct spelling of his name is Demonn. Petitioner's Exhibit 23.

> lead to his death. And it was Damon Carter who owed Gary Davenport money for prior drug dealings. The evidence will also show that it was Damon Carter's description that Ron Carter gave to the police as the suspect in the crime. And it is when that description went over the news that Damon Carter hunted down Ron Carter and found him bedridden in a hospital bed at Wishard. And Ron Carter will tell you that when he Damon Carter, [sic] he was frightened because he felt that he had come to finish him off because he was the lone survivor. And it is that fear that lead Ron Carter to falsely accuse Michael Johnson of this crime. Ladies and Gentlemen, we're asking you to be the fair jurors we know you are. We're asking to wait [sic] until you hear all the evidence before you make a decision. We're asking that you not jump to conclusions, but wait until you hear the evidence and the final arguments before you make your decision. Because if you do that, if you wait, you will find that Michael Johnson did not commit these crimes. That he has been falsely accused and that he is an innocent man.

*Id.*, Supp. Vol. at 100-01.

10. According to counsel Casanova's post-conviction testimony, Petitioner planned on testifying. During trial, however, Casanova recommended against Petitioner taking the stand, and Petitioner decided not to testify. Casanova also testified that the decision to testify belonged to Petitioner, and if Petitioner had insisted on testifying, Casanova would have deferred to Petitioner's decision.

11. Casanova also testified at the post-conviction hearing that there was no doubt that both Petitioner and co-defendant Carter were at the scene of the crime. Casanova testified that the co-defendant Carter's visit to victim Carter in the hospital was important, but Casanova testified that – to the best of he recollection – he did not depose the family members that witnessed the visit.

12. During direct examination, victim Carter testified that he described the individuals who committed the crimes and that he gave the police officers co-defendant Carter's last name, because victim Carter did not know his first name. *Id.* at 271. Victim Carter also testified that co-defendant Carter came to his hospital room and that frightened him. *Id.* at 278. Victim Carter also testified that he did not change his story after the incident at the hospital. *Id.* at 278. Victim Carter unequivocally identified Petitioner as the man who shot Gary Davenport and himself. *Id.* at 288. Ronald Carter never identified Damone Carter as the shooter then changed his story to identify the petitioner as the shooter.

13. Counsel cross-examined victim Carter about his ability to perceive the crimes and about co-defendant Carter's visit to the hospital. *Id.* at 290-294. Counsel specifically questioned victim Carter about his state of mind during the hospital visit. *Id.* Counsel questioned victim Carter about co-defendant Carter's physical appearance, and victim Carter testified that codefendant Carter had gold teeth. *Id.* at 297-98. Counsel questioned victim Carter about his knowledge regarding co-defendant's criminal history, and the State objected. *Id.* at 299. Counsel explained to the Court that he was attempting to establish victim Carter's state of mind

about co-defendant Carter. The Court overruled the objection, and counsel cross-examined victim Carter about the fact that victim Carter knew co-defendant Carter was an ex-convict who was looking to buy drugs and owed money to Davenport for drugs. *Id.* at 300-03.

14. During the direct examination of Detective Charles Briley, the State moved to admit Exhibit 54, Petitioner's audiotaped statement and requested that it be played for the jury. *Id.* at 490. Petitioner did not object to the admission until the State explained that it would not move for the admission of the transcript of that statement. *Id.* Counsel stated, "We would object on those grounds [that the transcript was not offered] and we'll offer . . . attempt to offer the statement on our recross as a Defendant's Exhibit." *Id.* at 491.[2] The Court admitted State's Exhibit 54 and allowed the State to play the audiotape over Petitioner's objection. *Id.*

15. During Briley's cross-examination, counsel questioned him about the initial description of the assailants from victim Carter and the condition of the crime scene, and the Court admitted Defendant's Exhibits A and B, photographs of the crime scene. *Id.* at 457-64. Counsel also

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2. As found below, Petitioner did, in fact, admit the transcript of his statement. The Court notes that the appellate court states, "The State introduced into evidence a tape and transcript of Johnson's statement to an investigating officer in which Johnson refers to being on parole. (R. at 492, 608.)" *Johnson*, 725 N.E.2d at 867. Although the court cites the correct page for the admission of the transcript, a closer review of Petitioner's Record of Proceedings shows that Petitioner - not the State - moved for the admission of the transcript.

cross-examined Briley about the treatment of co-defendant Carter. *Id.* at 460-61, 469, 471, 472. Counsel also specifically questioned Briley about State's Exhibit 39, a photograph of the crime scene that shows a footprint. *Id.* at 465. Furthermore, Counsel admitted into evidence Defendant's Exhibit F, which was a pair of tennis shoes, which were recovered from the petitioner on April 22, 1997. *Id.* at 481. Attorney Earnest later made an oral Motion in Limine to prohibit the State from questioning Det. Briley about a substance on the tennis shoes and whether it was blood. The Court granted the Motion in Limine. *Id.* at 486-487. Counsel questioned Briley about Petitioner's voluntary statement and said, "And you asked him 59 questions and he answered all of them." *Id.* at 470. Counsel then asked, "And some of them he answered in great detail to you?" *Id.* Briley testified that co-defendant Carter had gold teeth and that victim Carter identified his assailant as having gold teeth. *Id.* at 480-81. Counsel moved for the admission of Petitioner's shoes, which Briley had taken from Petitioner at the time of his arrest. *Id.* at 481-83, Defendant's Exhibit F. The Court admitted the shoes as evidence. *Id.*

16. Counsel also subpoenaed counsel for co-defendant Carter to testify at trial to impeach Detective Michael Forrest's testimony that co-defendant Carter was not a confidential informant. *Id.* at 513. The Court found that co-defendant Carter's, attorney Carl Epstein had an attorney client privilege regarding the communications with his client, Damone Carter. Therefore, after a hearing on the motion, the Court granted co-defendant Carter's counsel's Motion to Quash the subpoena. *Id.* at 120, 512-16.

17. Jarel Wilhite was brought to the Marion County Jail as requested by petitioner's counsel, and during the trial, counsel Casanova spoke to Wilhite. *Id.* at 516-17. Wilhite did not testify.

18. Counsel then presented evidence on Petitioner's behalf including the testimony of Det. Forrest and Officer Marta Bell. *Id.* at 557, 582. Petitioner's counsel also presented – by stipulation – a videotape of the house in which the crime occurred. *Id.* at 560-62. Over the State's objection, the Court admitted Defendant's Exhibit J, a two-page report prepared by Det. Briley. *Id.* at 592-595.

19. Counsel Earnest, an experienced trial attorney, also presented – and the Court admitted – the transcript of Petitioner's voluntary statement as Defendant's Exhibit K. *Id.* at 596-610. This 14-page transcript contains Petitioner's version of the crimes, i.e., that Petitioner went to Davenport's house after co-defendant Carter told him they were going to rob Davenport, that Petitioner loaned his gun to co-defendant Carter, co-defendant Carter and Davenport argued about drugs and money and that co-defendant Carter shot the two victims. *Id.* at 597-610. On page 12 of the statement, Petitioner made the following statement in response to Det. Briley's question about the gun:

> IT WAS A 9MM . . INAUDIBLE.. I BEEN HAVING THE GUN FOR YEARS; I BEEN HAVING TIE GUN FOR YEARS . . . AND LIKE WHEN I HAD GOT OUT IN 96, JULY OF 96, IT WAS JUST SITTING THERE AND LIKE I SAID I DON'T CARRY IT OR NOTHING, IT'S JUST

> THERE FOR PROTECTION, I DON'T KNOW WHY, KNOWING I WAS ON PAROLE I WASN'T SUPPOSE TO HAVE A GUN BUT TT WAS JUST THERE, I JUST KEPT IT FULL AND KEPT IT LOADED, I AIN'T NEVER CARRIED THE GUN.

*Id.* at 608.

20. In closing, counsel Casanova argued that "If you look at those motivations, you're going to find that the emotion of fear so taints Ron Carter's testimony that you could not rely on it to convict Michael Johnson." *Id.*, Supp. Vol. at 116. Counsel argued that co-defendant Carter was motivated to kill Davenport "[t]o get rid of that debt . . ." *Id.* at 118. Counsel argued, "we're not saying that Mike's a Boy Scout," but that Petitioner had no motive to shoot either Davenport or victim Carter. *Id.* at 118-19. Counsel specifically argued that victim Carter was "locked into this lie because of fear of Damon Carter." *Id.* at 120. Counsel also relied on Petitioner's statement and the fact that co-defendant Carter visited victim Carter in the hospital. *Id.* Counsel also attacked victim Carter's ability to perceive the events and his credibility and that "physical evidence simply does not support finding Michael Johnson guilty of these crimes beyond a reasonable doubt." *Id.* at 121-23.

21. Counsel Earnest also made closing argument and argued that Petitioner was truthful in his statement. *Id.* at 125. Counsel also argued that the police did not handle the evidence properly and that co-defendant Carter "went to the hospital with the specific intent to intimidate Ronald

Carter." *Id.* at 126-31. Counsel also focussed on the unidentified footprint at the crime scene to argue that the State had not proved its case beyond a reasonable doubt. *Id.* at 134-35.

22. The jury convicted Petitioner for carrying a handgun without a license, murder and attempted murder. *Id.* at 178-80.

23. Patricia Caress McMath represented Petitioner on appeal and raised two issues: "Whether error occurred when the jury heard some evidence of Johnson's prior criminal history, and [w]hether Johnson's sentence was manifestly unreasonable." *Johnson*, 725 N.E.2d at 866 the appellate court found that Petitioner had waived any error in the admission of evidence that he was on parole by failing to object and that his sentence was not manifestly unreasonable. *Id.* at 867, 869.

24. On February 28, 2001, Judge Tanya Walton Pratt convicted co-defendant Carter after a court trial for the murder of Tomica Stewart, his girlfriend. Petitioner's Exhibit 3.

25. Petitioner filed his Petition for Post-Conviction Relief by counsel on November 21, 2001, and raises the following claims: a) counsel was ineffective for failing to investigate; b) the Court improperly admitted evidence that Petitioner committed other crimes; and c) newly discovered evidence that Petitioner's co-defendant was convicted for murder after Petitioner's trial.

26. The State answered the Petition on December 7, 2001, and asserted the affirmative defenses of waiver and res judicata.

27. On January 10, 2003, post-conviction counsel deposed co-defendant Carter. Petitioner's Exhibit 22. Although co-defendant Carter asserted his Fifth Amendment Right against self-incrimination to the vast majority of counsel's questions, Carter testified, "I didn't shoot nobody." Id. at 9. Carter also testified, ". . . I never testified against your client. And I don't want to. But if I'm called to get on the stand, I will testify against him." *Id.* at 10-11.

28. The Court held a hearing in this Cause on January 14, 2003. Petitioner presented the testimony of Attorney Robert Hill, trial counsel Raymond Casanova, and Petitioner testified on his own behalf. The parties by stipulation presented documentary evidence in the form of Performance Guidelines for Criminal Defense Representation, the Record of Proceedings from Petitioner's direct appeal, victim Carter's medical records, co-defendant Carter's criminal history, the memorandum decision from co-defendant Carter's 2001 murder conviction, a police report, a memorandum from Lori Howard, Casanova's calendar, co-defendant Carter's voluntary statement, victim Carter's voluntary statement, the opinion from Petitioner's direct appeal, affidavits from Howard, David Williams, and Brian J. Clouse, and the audio and video deposition – and transcripts of the depositions – for Clara Carter, victim Carter, co-defendant Carter, and counsel Earnest. The Court took judicial notice of its file.

29. Attorney Casanova testified at the post-conviction hearing that Damone Carter was never deposed because "he was a co-defendant in the case – so – he had a right against self incrimination. .One of the issues that was kind of ongoing in the case was whether the State was going to make some type of deal with him (Damone Carter) to testify against Michael. And I think that's one of the concerns that we had – as to why he needed to be deposed. And it was really – it wasn't until – I think right before the trial that the State made the decision that they were not going to use him and – and that they were going to try the cases separately."

## CONCLUSIONS OF LAW

1. Post-conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). This collateral challenge to the conviction is limited to the grounds enumerated in the postconviction rules. *Id.* (citing Ind. Post-Conviction Rule 1(1)). Thus, in order to grant relief, the Court must find that the preponderance of the evidence proved that Petitioner is entitled to relief. Id. The post-conviction procedure, however, is not a "super-appeal," and not all issues are available. *Id.* "If an issue was known and available, but not raised on direct appeal, it is waived. If it was raised on appeal, but decided adversely, it is res judicata." *Id.* (citing *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999)).

2. Petitioner is entitled to no relief on his claim that trial counsel was ineffective. Petitioner alleges that trial counsels performed deficiently because they "failed to

properly investigate this matter, including in particular the facts that would support my defense that now-convicted murderer Damone Carter was the person who, committed the crimes that I was charged with. My counsels also failed to properly pursue this defense at trial." Petition, ¶19(a).

The well-known standard for ineffective assistance of counsel comes from *Strickland v. Washington*, 466 U.S. 668 (1984). *Brightman v. State*, 758 N.E.2d 41, 46 (Ind. 2001). To prove that counsel performed ineffectively, Petitioner must show both deficient performance and resulting prejudice. *Id.* Deficient performance is defined as performance outside an objective standard of reasonableness. *Id.* "Prejudice exists when a defendant shows 'there is a reasonable probability [i.e., probability sufficient to undermine confidence in the outcome] that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting Strickland, 466 U.S. at 694). The two prongs are separate and independent inquiries, and if a court can "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Timberlake, 753 N.E.2d at 603 (citing *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quoting *Strickland*, 466 U.S. at 697)).

Our Supreme Court has rejected a claim that counsel was ineffective, as follows:

> Isolated omissions or errors, poor strategy, or bad tactics are not in themselves evidence of deficient performance. *Brown v. State*, 691 N.E.2d 438, 446 (Ind. 1998); *Wooden v. State*, 657 N.E.2d 109, 112

> (Ind. 1995). In this case, counsel for the defendant filed various motions, presented opening and closing arguments, formulated and followed a trial strategy, cross-examined witnesses, presented evidence, requested and received hearings outside the presence of the jury, objected to one of the court's tendered jury instructions, tendered a proposed jury instruction, and objected to the court's submission of exhibits to the jury during deliberation (after the jury sent a note to the judge regarding the admissibility of a statement). We find that defense counsel subjected the State's case to adversarial testing and that counsel's performance did not fall below an objective standard of reasonableness based on prevailing professional norms. We decline the defendant's claim of ineffective assistance of counsel.

*Childers v. State*, 719 N.E.2d 1227, 1231 (Ind. 1999). Before turning to Petitioner's specific claim, the Court finds that counsel's performance included: meeting with defendant; formulating a specific theory; conducting an investigation to support that theory; deposing State's witnesses; filing pre-trial motions; making an opening argument that coherently presented Petitioner's theory of defense; objecting to jury instructions; cross-examining the State's witnesses in a manner to impeach them and support Petitioner's theory; presenting witnesses on Petitioner's behalf; preserving potential errors for direct appeal by objecting to the admission of evidence; moving for a directed verdict; requested the Court grant motions in limine which the Court granted, and making a closing argument consistent with Petitioner's

testimony and the theory of defense. In other words, the Court finds that trial counsel subjected the State's evidence to meaningful adversarial testing and clearly performed within the objective standards of reasonable performance. Thus, the Court finds that counsel Casanova and Earnest were effective. *Childers*, 719 N.E.2d at 1231.

Satisfying his burden of proving that counsel was ineffective for failing to investigate requires that Petitioner go beyond the trial record to show what the investigation, if undertaken, would have produced. *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998). "This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result." *Id.* (citing *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997)). In other words, Petitioner must present to the post-conviction court evidence that was available to counsel – had they conducted the type of investigation Petitioner now claims they should have – that would have resulted in Petitioner's acquittal. The Court finds that Petitioner has failed to produce such evidence.

Petitioner's "extra-record" evidence, i.e., evidence collected in the post-conviction investigation that would have been available to trial counsel, includes: testimony from victim Carter and his mother and other family members regarding co-defendant Carter's hospital visit; co-defendant Carter's testimony; victim Carter's medical records documenting co-defendant Carter's hospital visit; and Petitioner's testimony. None of the evidence produced during the post-conviction investigation constitutes evidence that would have changed the result of Petitioner's trial.

*Appendix B*

Co-defendant Carter's testimony during his deposition of January 10, 2003 makes Petitioner's conviction a more likely result on re-trial.

Furthermore, the Court finds that trial counsel properly pursued the defense that codefendant Carter - and not Petitioner - was the shooter. This was the linchpin of trial counsel's theory of defense supported by the fact of the hospital visit. Counsel aggressively pursued such evidence, and this evidence was presented to the jury. Counsel vigorously argued that victim Carter only identified Petitioner as the shooter after the hospital visit. Moreover, the State's evidence showed that co-defendant Carter was at the crime scene, and the jury was informed repeatedly that co-defendant Carter had gold teeth. Victim Carter testified that he identified co-defendant Carter at the crime scene. As counsel Casanova testified, the evidence clearly showed that co-defendant Carter was present at the crimes and was immediately identified by victim Carter. Counsel also sought the admission of the transcript of Petitioner's complete statement that identified co-defendant Carter as the shooter, cross-examined the investigating officer about Petitioner's willingness to answer questions, and argued to the jury that Petitioner was truthful in his statement. Petitioner's Exhibit 24 at 125.

To the extent that counsel's recommendation that Petitioner not testify can be construed to fit under Petitioner's claim of ineffective assistance, the Court finds that Petitioner was not prejudiced by this recommendation. Counsel was able to have Petitioner's version of the crimes presented to the jury – including Petitioner's inculpatory statements about

his presence at the scene and possession of the murder weapon and Petitioner's exculpatory statements that his codefendant was the shooter – without any of the risk attendant to Petitioner's testimony, including potential impeachment by his statement and cross-examination. Without Petitioner's live testimony, counsel was able to argue to the jury that Petitioner answered every question put to him. Moreover, Petitioner's testimony at the post-conviction hearing was cumulative to his voluntary statement, and the Court finds such testimony would not have affected the jury's verdict given the strength of the eyewitness testimony.

The Court also finds that counsel's failure to present co-defendant Carter as a witness or depose him was not deficient performance. Trial counsel cannot be found to have performed deficiently simply by failing to identify, interview or depose witnesses. *Williams v. State*, 724 N.E.2d 1070, 1076 (Ind. 2000). A post-conviction petitioner must identify what additional information would have been discovered and how he was prejudiced by the absence of this information. Id. The only additional information Petitioner was able to identify in his postconviction investigation was co-defendant Carter's threat to testify against Petitioner. Given the eyewitness identification of Petitioner as the shooter, the repeated identification of co-defendant Carter during the trial, and the potential that co-defendant Carter would have testified that Petitioner was the shooter – as he stated to the investigating officer – the Court also finds that Petitioner was not prejudiced by counsel's failure to either call the co-defendant as a witness during trial or depose him.

*Appendix B*

Counsel Casanova testified at the post-conviction hearing that it would have been a good idea to present the cumulative evidence identified by Petitioner in support of the defense theory. Scrutiny of counsel's performance, however, "is highly deferential and should not be exercised through the distortions of hindsight." *Timberlake*, 753 N.E.2d at 605 (quoting *Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind. 1995)). More importantly, though, the Court finds that all the evidence Petitioner produced at his post-conviction hearing was cumulative to the evidence presented by trial counsel. Specifically, in reference to the hospital incident wherein codefendant Carter went to victim Carter's hospital room. Victim Carter testified that this did occur and that it was frightening to him. The presentation of additional witnesses like family members, security guards, hospital personnel, and medical records would be cumulative of the testimony the jury already heard. The Court, therefore, finds that Petitioner has proven neither deficient performance nor prejudice from counsel's alleged failure to investigate and pursue a defense.

3. Petitioner is not entitled to review of his freestanding claim that improper evidence was admitted against him because that issue was decided against him during his direct appeal. Petitioner specifically challenged the admission of this evidence during his direct appeal, and the appellate court found that the issue was not preserved. *Johnson*, 725 N.E.2d at 867. The Court, therefore, finds that review of Petitioner's claim that the evidence was improperly admitted is barred by the doctrine of *res judicata*. To the extent that this issue can be characterized as trial counsel's ineffectiveness for failure to object, the Court finds that this claim fails.

Even assuming that an objection to this evidence would have been sustained, a failure to object does not constitute ineffective assistance of counsel if the decision to remain silent "could well have been a strategic decision by counsel." *Pennycuff v. State*, 745 N.E.2d 804, 815 (Ind. 2001) (quoting *Charlton v. State*, 702 N.E.2d 1045, 1051 (Ind. 1998)). The Court finds that counsel's decision to not object to evidence that Petitioner was on parole was part of a conscious strategy. As noted above, counsel Earnest, who had tried fifteen to twenty prior murder cases, deliberately moved for the admission of the transcript of Petitioner's voluntary statement during the petitioner's case and cross-examined Detective Briley about the fact that Petitioner answered all 59 question's asked of him. Counsel was then free to argue to the jury that Petitioner was no Boy Scout but that he was truthful in his statement to the police. Petitioner's Exhibit 24, Supp. Vol., pp. 118, 125. Furthermore, in his voluntary statement Petitioner told Detective Briley that he provided Damone Carter the gun and that he knew co-defendant Carter was going to Gary Davenport's home to do a "lick" or robbery. There was also testimony that co-defendant Carter and victim Carter knew each other from prison. It is clear from the evidence that the jury knew that victim Carter, co-defendant Carter, Davenport, and the petitioner were not boy scouts as attorney Casanova pointed out in his closing argument. The bottom line is the jury knew that all four were aware that drugs were involved, and that co-defendant Carter and the petitioner knew that co-defendant Carter was going to commit a "lick" or robbery. The Court finds that Petitioner is entitled to no relief on his claim that the Court erred in admitting evidence about his criminal history either as freestanding error or as a claim that counsel's assistance was ineffective.

4. Finally, the Court finds that Petitioner is not entitled to relief on his claim that codefendant Carter's subsequent murder conviction is newly discovered evidence because Petitioner cannot to meet the nine-prong test for newly discovered evidence. In order to satisfy his burden of showing that he is entitled to relief on the basis of newly discovered evidence, Petitioner must show that: 1) the evidence has been discovered since the trial; 2) it is material and relevant; 3) it is not cumulative; 4) it is not merely impeaching; 5) it is not privileged or incompetent; 6) due diligence was used to discover it in time for trial; 7) the evidence is worthy of credit; 8) it can be produced on a retrial of the case; and 9) it will probably produce a different result. *Powell v. State*, 714 N.E.2d 624, 627 (Ind. 1999) (court affirmed post-conviction court's rejection of recantation as newly discovered evidence).

The Court first notes that although the newly discovered evidence test does not explicitly require that the evidence have been available at the time of trial, such determination is implicit in prong six and that requires that due diligence was used to discover the evidence in time for trial. Obviously, this evidence – co-defendant's 2001 murder conviction – was not available at trial. Our Supreme Court has observed that "newly available" evidence is not necessarily synonymous with "newly discovered" evidence. *Wisehart v. State*, 693 N.E.2d 23, 36 (Ind. 1998) (citing *United States v. Metz*, 652 F.2d 478, 480 (5th Cir.1981). The Court finds that co-defendant Carter's 2001 murder conviction is not newly discovered evidence as contemplated by Indiana caselaw.

Regardless, the Court also finds that Petitioner cannot prevail because he fails to satisfy – at the least – prongs two, four, and nine of the newly discovered evidence test. First, the Court finds that the evidence that co-defendant Carter subsequently murdered his girlfriend is neither material nor relevant to the facts of Petitioner's crimes. Indeed, the only reason that such evidence could be admitted at a retrial is for impeachment purposes under Indiana Rule of Evidence 609(a). Thus, while this evidence may meet prong eight, it fails prong four. Finally, the Court finds that such evidence would not produce a different result on retrial. Petitioner's conviction is supported by the eyewitness testimony of the surviving victim and Petitioner's own statements that he was at the crime scene and provided the murder weapon. The jury heard this evidence and Petitioner's uncontested statements that his co-defendant was a drug dealer, owed the victim money, argued with the victim and then shot the victim. And the jury still convicted Petitioner under the State's theory that Petitioner was the shooter. Therefore, the Court finds that the fact that Petitioner's co-defendant committed a murder several years later would not result in Petitioner's acquittal upon retrial.

In order to grant relief on such a claim, the Court must make findings on all nine prongs. *See State v. McCraney*, 719 N.E.2d 1187, 1189 (Ind. 1999) (court remanded case to Postconviction court for findings on all nine prongs). Because Petitioner cannot meet the test for newly discovered evidence, the Court finds that Petitioner is entitled to no relief on this claim.

5. The law is with the State and against the Petitioner.

*Appendix B*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Petition for Post-Conviction Relief is hereby DENIED.

All so ordered this day 14th day of February, 2003.

s/ Heather Welch
Heather Welch, Commissioner
Marion Superior Court
Criminal Division One

The above Findings of Fact and Conclusions of Law are hereby adopted by this Court, and are hereby made an order of this Court this 18 day of February 2003.

s/ Judge Tanya Walton Pratt
JUDGE TANYA WALTON PRATT
Marion Superior Criminal Court One

## APPENDIX C — JUDGMENT OF THE SUPREME COURT OF INDIANA FILED MARCH 29, 2000

**IN THE**
**SUPREME COURT OF INDIANA**

No. 49S00-9703-CR-191

MICHAEL JOHNSON,

Appellant (Defendant Below),

STATE OF INDIANA,

Appellee (Plaintiff Below).

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt
Cause No. 49G01-9703-CF-42739

March 29, 2000

SHEPARD, Chief Justice

Appellant Michael Johnson appeals his conviction and sentence for murder, attempted murder, and carrying a handgun without a license. He presents two issues:

I. Whether error occurred when the jury heard some evidence of Johnson's prior criminal history, and

II. Whether Johnson's sentence was manifestly unreasonable.

*Appendix C*

**Facts and Procedural History**

On March 17, 1997, Johnson and Damone Carter ("Damone") went to the home of Gary Davenport. There is conflicting testimony about the nature of the visit, although it was either to purchase drugs from Davenport or to rob him. (*See* R. at 33940, 600-01.) Ronald Carter ("Ronald"), a friend of Davenport, was also at the house; he was watching television and trying "to program a radio." (R. at 261.)

When Johnson and Damone arrived at the house, Davenport came outside and spoke with Damone. Then, Ronald called out to Davenport that he had a phone call, so the three entered the house. At first, Damone, Ronald, and Johnson sat in the living room while Davenport went into a back room to hang up the phone. Damone and Ronald had previously met in prison and began getting reacquainted. After Davenport hung up the phone, he went into the kitchen area, which was visible from the living room. Johnson and Damone walked in between the living room and the kitchen, speaking with Davenport and with each other.

Eventually, Ronald looked up from fixing the radio and noticed that both Johnson and Damone were in the doorway facing him. Johnson pulled a gun out of the waistband of his pants. Ronald tried to run toward a patio door to his left, but a shot hit him in the back of the leg. Ronald fell, but managed to pull himself up and attempted to throw a television at Johnson, who was still standing in the doorway. By now, however, Johnson had turned and was shooting at Davenport, who was still in the kitchen. When Ronald threw the television, Johnson turned and again shot at Ronald, hitting

him in the arm. This shot caused Ronald to fall through the patio door.

When the police arrived, Ronald was still lying on the patio. Davenport was found dead, with gunshot wounds, in a utility room off of the kitchen. Ronald was taken to the hospital and required surgery.

The day after the shootings, Damone met with several police detectives and revealed that Johnson had shot Ronald and Davenport. At trial, Ronald identified Johnson as the man who shot him and Davenport.

The trial court sentenced Johnson to concurrent sentences of sixty years for murder, forty years for attempted murder, and one year for carrying a handgun without a license.

## I. Evidentiary Error is Not Preserved

Johnson first says the jury improperly heard evidence about his previous incarceration on an unrelated charge. The State introduced into evidence a tape and transcript of Johnson's statement to an investigating officer in which Johnson refers to being on parole.[1] (R. at 492, 608.)

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1. Specifically, Johnson states, in reference to carrying a handgun:

> I been having the gun for years, I been having the gun for years . . . and like when I had got out in 96, July of 96, it was just sitting there and like I said I don't carry it or nothing, it's just there for protection, I don't know

(Cont'd)

*Appendix C*

The prosecutor twice mentioned Johnson's parole during closing argument. (Supp. R. at 111, 113.)

Defense counsel did not object to this portion of Johnson's statement or request that the references to parole be redacted. Nor did counsel object to the prosecutor's statements during closing. Failure to object to the admission of evidence waives an error for appellate review. *Townsend v. State*, 632 N.E.2d 727 (Ind. 1994). Similarly, a claim of prosecutorial misconduct is waived if there is no objection. *Stevens v. State*, 691 N.E.2d 412 (Ind. 1997), *cert. denied*, 119 S. Ct. 550 (1998).[2]

Johnson also claims error occurred when the State asked an investigating officer, Detective Forrest, whether he had "any information with respect to Michael Johnson." (Appellant's Br. at 6, R. at 357.) Because Forrest had just finished discussing Damone Carter's drug activities, Johnson argues that the question left the jury with the impression that "Detective Forrest knew about Michael because Michael was involved in the drug trade." (Appellant's Br. at 6-7.)

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(Cont'd)

> why, knowing I was on parole I wasn't suppose[d] to have a gun but it was just there, I just kept it full and kept it loaded, I ain't never carried the gun.

(R. at 608.)

2. Johnson claims these events are fundamental error, namely, a "blatant violation of basic principles rendering the trial unfair to the defendant." (Appellant's Br. at 7.) They are not.

Defense counsel objected to the question before Forrest was able to respond, and the court admonished the jurors and instructed them that questions were not evidence. We find this reference to Johnson's prior misconduct fragmentary at best. *See Schlomer v. State*, 580 N.E.2d 950 (Ind. 1991). The probable persuasive effect of the question was negligible.

**II. Five-Year Enhancement Was Reasonable**

Johnson next claims that his concurrent sentences of sixty years for murder and forty years for attempted murder were manifestly unreasonable.

In imposing a sentence, a court should 1) identify the significant aggravators and mitigators, 2) relate the specific facts and reasons that lead the court to find those aggravators and mitigators, and 3) demonstrate it has balanced the aggravators against the mitigators in reaching its sentence. *Gregory v. State*, 644 N.E.2d 543 (Ind. 1994). Sentencing decisions rest within the sound discretion of the trial court and we review them only for abuse of discretion. *Archer v. State*, 689 N.E.2d 676 (Ind. 1997).

The trial court here found three statutory aggravating factors: 1) Johnson's history of criminal and delinquent activity, 2) that Johnson is in need of correctional or rehabilitative treatment that can best be provided in a penal facility, and 3) that the imposition of a reduced sentence or probation would depreciate the seriousness of the crime. (R. at 683-84.) As mitigating factors, the court listed Johnson's remorse and his strong family support. (*Id.*) It then determined that the aggravating factors outweighed the mitigating factors. (*Id.*)

*Appendix C*

The trial court properly found that Johnson's criminal history was an aggravating factor. *See* Ind. Code Ann. § 35-381-7.1(b)(2) (West Supp. 1997). The court appropriately noted that Johnson was on parole at the time of the incident and had a prior conviction for criminal recklessness as a Class C felony and a true finding of criminal recklessness as a juvenile.

The court also properly determined that Johnson is in need of correctional and rehabilitative treatment best provided by a penal facility based on the fact that he had previously, and unsuccessfully, been placed on juvenile probation and adult probation, had been to prison, and was on parole when he committed the crime. (R. at 684); *see also* Ind. Code Ann. § 3538-1-7.1(b)(3) (West Supp. 1997).

As for finding that a given sentence might "depreciate the seriousness" of a crime, courts speak about this factor in two different ways. Indiana Code § 35-38-1-7.1 (b) (4) says it is an aggravating circumstance that the "[i]mposition of a reduced sentence . . . would depreciate the seriousness of the crime." Stated this way, the aggravator may only be used when mitigators might otherwise call for a sentence shorter than the presumptive one. *See Ector v. State*, 639 N.E.2d 1014, 1016 (Ind. 1994). By contrast, judges sometimes say that a sentence less than an enhanced term sought by the prosecution would depreciate the seriousness of the crime, and this is an appropriate aggravator. *Id.*

Here, the trial court said that imposition of a "reduced sentence below the presumptive would depreciate the seriousness of the crime." (R. at 684.) It did not appear that

the judge was considering a sentence below the standard term, however, so this finding was either inappropriate or entitled to very little weight.

Still, only one valid aggravating circumstance is necessary to support an enhanced sentence. *Hollins v. State*, 679 N.E.2d 1305 (Ind. 1997). Since the trial court found two valid aggravating circumstances, the inappropriate use of this one aggravator did not make the enhanced sentence manifestly unreasonable.

Johnson also claims the court should have found additional mitigating circumstances: 1) that Damone Carter initiated the crime – not Johnson, 2) that Johnson committed the crime at a young age, and 3) that Johnson is a father who supports his child. (Appellant's Br. at 12.)

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." *Wingett v. State*, 640 N.E.2d 372, 373 (Ind. 1994). "Only when the trial court fails to find a significant mitigator that is clearly supported by the record is there a reasonable belief that it was improperly overlooked." *Legue v. State*, 688 N.E.2d 408, 411 (Ind. 1997).

*Age.* Johnson was twenty years old at the time of the incident. We have previously held a court sentencing a twenty-one year old for murder could legitimately decide not to find age as a mitigator. *Herrera v. State*, 679 N.E.2d 1322 (Ind. 1997). In light of that holding and a record demonstrating that the court was well aware of Johnson's

age[3] we cannot say the court erred by not finding youth a mitigator.[4]

*Fatherhood.* Dependent children are properly considered a mitigating factor under Ind. Code § 35-38-1-7.1 (c)(10). Because Johnson would likely be in prison throughout the minority of his child, even under the standard sentence,[5] we cannot attach significant weight to the mitigator. *See Battles v. State*, 688 N.E.2d 1230, 1237 (Ind. 1997).

*Instigator.* Finally, we address Johnson's contention that it was Damone Carter, and not Johnson, who initiated the crime. Inasmuch as it was Johnson who shot both victims, we are not surprised the trial court did not find this a significant mitigating factor.

On a more general level, we note that the trial court added only five years to the murder sentence and ten years to attempted murder. She could have enhanced the sentence ten years for murder and twenty years for attempt.[6] Moreover,

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3. It is clear from the record that the trial judge considered Johnson's age in sentencing stating: "You will be 52 years old if you get all of your good time when you get out of prison." (R. at 684.)

4. For sentencing purposes, maturity may be a better way of thinking of mitigating circumstances.

5. The presumptive sentence for murder is fifty-five years, to which the court added five. Ind. Code Ann. § 35-50-2-3 (West 1998).

6. *See* Ind. Code Ann. § 35-50-2-3 (West 1998); Ind. Code Ann. § 35-50-2-4 (West 1998).

she ran Johnson's sentences concurrently. This is not manifestly unreasonable.

**Conclusion**

We affirm the judgment of the trial court.

Dickson, Sullivan, Boehm, and Rucker, JJ., concur.

## APPENDIX D — DEFENDANT'S MOTION FOR CONTINUANCE OF THE SUPERIOR COURT, MARION COUNTY, CRIMINAL DIVISION FILED AUGUST 7, 1998

STATE OF INDIANA )
)SS:
COUNTY OF MARION )

**IN THE MARION COUNTY SUPERIOR COURT**
**CRIMINAL DIVISION, ROOM 1**
**CAUSE NUMBER: 49G01-9703-CF-42739**

STATE OF INDIANA

vs.

MICHAEL JOHNSON

**DEFENDANT'S MOTION FOR CONTINUANCE**

The Defendant, by counsel of the Marion County Public Defenders Agency, moves this court for a continuance. In support of request, the Defendant states the following:

1. The Defendant is charged with murder as a felony, attempted murder as a class A felony, and carrying a handgun without a license as a class C felony.

2. He is set for a final pretrial on August 10, 1998 with a jury trial set for August 17, 1998.

3. The Defendant needs additional time to adequately prepare for trial. Due to defense counsel's trial calendar over

the last two months, he has not had an adequate opportunity to prepare for trial.

4. Co-counsel, Robert Hill, has three other cases set for jury trial on August 17th. One of which is a murder trial in Marion County Superior Court 6 which is more than two years old.

5. Counsel for the co-defendant has been advised and does not object to the continuance.

6. The State has also been advised and objects to the continuance.

WHEREFORE, the Defendant requests this court to grant his request for a continuance.

s/ Ray Casanova
Ray Casanova, Deputy Public Defender
Marion County Public Defender Agency

## APPENDIX E — ORDER OF THE INDIANA SUPREME COURT DATED AND FILED OCTOBER 28, 2004

### IN THE INDIANA SUPREME COURT

Cause No. 49A02-0302-PC-168

JOHNSON, MICHAEL,

Appellant,

STATE OF INDIANA,

Appellee.

### ORDER

This matter is before the Indiana Supreme Court on a petition to transfer from a decision of the Court of Appeals, filed pursuant to Indiana Appellate Rule 57. The Court heard oral argument from counsel on September 9, 2004. After reviewing the briefs and the record submitted in this appeal, a majority of the Court has concluded (1) that it was not clearly erroneous for the post-conviction court to hold that petitioner received adequate trial representation that completely challenged the State's evidence, and (2) that the post-conviction court's strong conclusions of law demonstrate that it did in fact apply the proper legal standard in deciding the case. Accordingly, the Court now denies the petition to transfer jurisdiction.

The Clerk is directed to send copies of this order to Susan Carpenter, Public Defender of Indiana; to Steve Carter, Attorney General of Indiana; and to all counsel or record.

*Appendix E*

Done at Indianapolis, Indiana this 28th day of October, 2004.

s/ Randall T. Shepard
Randall T. Shepard
Chief Justice of Indiana

Shepard, C.J., Dickson, J., and Sullivan, J., vote to deny transfer.
Boehm, J., and Rucker, J., vote to grant transfer.

(2)

Supreme Court, U.S.
FILED
FEB 2 3 2005
OFFICE OF THE CLERK

No. 04-1015

IN THE

# Supreme Court of the United States

MICHAEL JOHNSON,

*Petitioner,*

*v.*

STATE OF INDIANA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF INDIANA

## *AMICUS CURIAE* BRIEF OF DEAN EMERITUS NORMAN LEFSTEIN IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST[1]

The interest of *Amicus Curiae* (hereafter *amicus*) derives from his many years of professional interest and service - as a law school dean, law professor, and practicing defense attorney - in the quality of representation furnished to the indigent accused in criminal cases. *Amicus* is Dean Emeritus and Professor of Law at Indiana University School of Law - Indianapolis. *Amicus* currently chairs the American Bar Association's Indigent Defense Advisory Committee, which seeks to improve defense services for the poor nationwide, and chairs the Indiana Public Defender Commission. *Amicus* was the Reporter for the American Bar Association's *Standards for Criminal Justice Relating to the Prosecution Function, The Defense Function,* and *Providing Defense Services* (2d ed. 1979), and chaired the ABA Task Force that oversaw the preparation of the third edition of these chapters, which were published in 1993.[2]

In addition to serving as Director of the District of Columbia Public Defender Service during the 1970's, *amicus* has published scholarly material regarding indigent defense services, and often has been qualified as an expert witness

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[1] Pursuant to S.Ct. Rule 37.6, *amicus* discloses that he is the author of this brief, although he received assistance from his counsel, John R. Maley, who is also counsel for Petitioner. *Amicus* prepared the brief *pro bono.* Petitioner's counsel and/or his firm are providing the sole monetary contribution for printing this brief. Petitioner and Respondent have consented in writing to this *amicus* brief and their letters of a consent are being lodged herewith.

[2] This brief is filed by the *amicus* as an individual. The brief is not submitted on behalf of the Indiana Public Defender Commission nor the American Bar Association committee that *amicus* chairs.

in federal and state courts concerning effective defense representation and systems for providing defense services. Most recently, *amicus* co-authored *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,*[3] an in-depth report from the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants based on analysis and national hearings regarding criminal defense for those unable to afford counsel. This report was released by the ABA on February 11, 2005.

## SUMMARY OF ARGUMENT

This Petition presents important issues of federal constitutional law that should be addressed and settled by this Court, including the extent to which a defense lawyer must prepare a defendant to testify at his trial, whether the decision to testify must genuinely be made by the defendant, the extent to which the trial court should inquire of defendant whether he has made a conscious decision to waive his constitutional right to testify, and whether this decision has been made in consultation with counsel. Defendants in criminal cases have the constitutional right to testify on their own behalf, but that right is infringed if defense counsel fails to prepare them to testify. Because many public defender offices in this country are inadequately funded, understaffed, and overburdened, Petitioner is unfortunately not alone in being denied his right to testify through ineffective assistance. This Court should grant the Petition to confirm that the Sixth Amendment requires defense counsel to prepare the defendant to testify so that defendant can make an informed

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[3] American Bar Association, December 2004, available at www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

decision whether to testify and have the benefit of counsel's assistance in doing so.

## ARGUMENT

This case presents issues of great public importance that should be addressed by this Court. Although the case may appear at first blush to simply be a disputed murder case in which the wrong suspect appears to have been convicted and sentenced to 60 years, it actually presents a critical constitutional issue concerning the duties of criminal defense lawyers in representing their accused clients. This matter is therefore a prime opportunity for this Court to underscore the importance of preparing a defendant to testify in criminal cases.

The Court has emphasized that the "goal" in providing counsel "is ... to ensure that defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1983). Unfortunately, in this country's strained public defense system, many defendants like Petitioner are deprived their fair trial due to ineffective assistance of counsel. Here, Petitioner was denied his constitutional right to testify. *Rock v. Arkansas*, 483 U.S. 44, 46 (1987) (in confirming the constitutional right to testify to be a fundamental right, the Court writes, "In fact, the most important witness for the defense in many criminal cases *is the defendant himself*") (emphasis added); *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system").

In a larger sense, this case typifies much of what is wrong with indigent defense representation in many states, as

detailed in the American Bar Association's recent 76-page report entitled, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice.*[4] Public defenders and others who provide defense representation sometimes find it exceedingly difficult to devote the necessary time to do what is required of them in defending their clients.[5] As a result, the goal of securing defense services for the indigent comparable to representation provided to persons of financial means is an unrealized hope. Because of this, innocent persons are sometimes convicted,[6] which is quite possibly what happened to the Petitioner, Michael Johnson, because his case simply was not sufficiently prepared for trial.

Indeed, this case is simple and undisputed on its facts: the public defender was not prepared for trial, and did not prepare Petitioner to exercise his constitutional right to testify. At the very least, his constitutional right to a fair trial has been violated, but unfortunately a divided 3-2 Indiana Supreme Court did not grant review to correct this injustice.

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[4] American Bar Association, December 2004, available at www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[5] *See, e.g.*, U.S. Dept. of Justice, *Keeping Defender Workloads Manageable*, (2001), which observes that "[e]veryday, defenders try to manage too many clients. Too often the quality of representation suffers. . . ."

[6] There is a significant body of literature documenting the dimension of the wrongful conviction problem in America's criminal courts involving both capital and non-capital cases. *See, e.g.*, *Wrongly Convicted: Perspectives on Failed Justice* (Saundra D. Westervelt & John A. Humphrey eds., 2001); Daniel Giveleber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent*, 49 Rutgers L. Rev. 1317 (1997).

Petitioner's tragic plight is not, unfortunately, an isolated occurrence. The insights, studies, and experiences of *amicus* throughout his career, as well as reported decisions around the country, confirm that the failure to prepare defendants to testify is a serious issue in this country.

In *Perrero v. State*, 990 S.W.2d 896, 899 (Tex. Ct. App. 1999), for instance, defense counsel was held to be ineffective for failing to adequately prepare the defendant before he testified. The court explained:

> Mr. Perrero described the entire process of deciding whether or not he would testify as being a split second decision. "After the state presented all their witnesses Mr. Hill [trial counsel] turned to me and asked me if I would care to get on the stand. And I told him I didn't know, and he said, 'Well, do you feel like doing it?' And I said, "I guess so'."

*Id.* at 899. In ordering a new trial, the Texas Court of Appeals concluded, "In this case, trial counsel's failure to properly prepare Mr. Perrero for his testimony was both ineffective and extremely prejudicial, to the extent that it undermines our confidence in the outcome of the proceeding." *Id.* Similarly, in *People v. Smith*, 237 A.D.2d 388, 655 N.Y.S.2d 416 (N.Y. S.Ct. 1997), the failure to prepare defendant to testify contributed to ineffective assistance of counsel.

Similarly, in *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), the court wrote:

> Smyth's failure to adequately consult with and prepare his client to testify did not meet the

> standard of competent representation. . . . Counsel's admission that he spent at most forty-five minutes with Turner prior to trial demonstrates deficient performance. . . . Smyth's cursory consultation is especially shocking in light of the seriousness of the charges against Turner, the fact that the entire defense hinged on Turner's intent and mental state, and that Turner testified in a manner that suggests he was wholly unprepared to answer questions on cross-examination.

*Id.* at 457.

Similarly, in *State v. Graham*, 906 S.W.2d 771, 786 (Mo. Ct. App. 1995), the court wrote, "The defendant made the decision [to testify], but the defendant was entitled to reasonably competent advice in making the decision." *Id., vacated, in part, on other grounds* at 969 S.W.2d 759 (Mo. Ct. App. 1998). In *Magbual v. State*, 2000 Haw. App. LEXIS 147, *26 (Haw. Ct. App. 2000), the court wrote that "if defense counsel fails to perform sufficient preparation and investigation to be able to adequately advise a defendant whether or not to testify, e.g., by failing to ascertain the full scope of a defendant's possible testimony, this could constitute a 'lack of diligence' amounting to ineffective assistance of counsel."

Moreover, this Court recently noted that an attorney must consult with an accused regarding his right to testify. In *Florida v. Nixon*, 2004 U.S. LEXIS 8270, 125 S. Ct. 551, 560, (Dec. 13, 2004), the Court wrote:

> An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,'

> including questions of overarching defense strategy. *Strickland*, 466 U.S. at 688. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.' *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

125 S. Ct. at 560 (parallel citations omitted).

Notwithstanding this authority, Indiana has effectively determined that accuseds in Indiana do not have the right to be prepared to testify. Yet this important issue - the failure of defenders to prepare their accuseds to testify - is apparently so prevalent that some jurisdictions have instituted requirements that trial courts *voir dire* accuseds who do not testify to ensure their rights have been protected. *See, e.g., Momon v. State*, 18 S.W.3d 152 (Tenn. 1999). Most states, however, including Indiana, do not have this procedural requirement, so Petitioners such as Michael Johnson are left to the whims of often inexperienced, understaffed public

defenders. This Court can address and resolve this important constitutional issue by granting the Petition and determining that accuseds must be prepared by their counsel to testify, and when they fail to do so relief must be granted.

## CONCLUSION

*Amicus* respectfully supports the Petition for a Writ of Certiorari so that the Court can address this important Sixth Amendment issue of ineffective assistance of counsel in failing to prepare accuseds to testify. Alternatively, if the Court were to determine not to exercise its discretionary jurisdiction to accept and hear this case on the merits to pronounce national guidance on this issue, given that Petitioner's constitutional rights were so clearly violated, the Court could and should simply direct the Indiana Court of Appeals to order a new trial so that Petitioner can receive the fair trial the Sixth Amendment and *Strickland* guarantee.

Respectfully submitted,

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